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CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 473

COYNE ELECTRICAL SCHOOL, INC.,
Petitioner,

vs.

F. J. BUCKLEY AND E. H. BUCKLEY, DOING BUSINESS AS F. J. BUCKLEY AND COMPANY,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS, FIRST DISTRICT, AND BRIEF IN SUPPORT THEREOF

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No. .....

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COYNE ELECTRICAL SCHOOL, INC.,
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vs.

F. J. BUCKLEY AND E. H. BUCKLEY, DOING BUSINESS AS F. J. BUCKLEY AND COMPANY,
Respondents.

PETITION FOR CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

COYNE ELECTRICAL SCHOOL, INC., defendant below, respectfully prays that a writ of certiorari issue to review the judgment of the Appellate Court of Illinois, First District (the highest court of that state in which a decision could be had for the purposes of this case), rendered by a divided Court, which reversed the judgment of the trial court which had dismissed the plaintiff's complaint in an action to recover contingent fees for the procurement of contracts with the United States Signal Corps for the training of military personnel at petitioner's school. The judgment of the Appellate Court became final on September 21, 1951.

SUMMARY STATEMENT OF THE MATTER INVOLVED

This action is one of the well-known "5% commission cases" (as they are commonly called) growing out of World War II. It is a matter of common knowledge that during the recent war thousands of selected military personnel were given thorough and seasoned training in the highly important and highly expert fields of radio, electronics, mechanics, etc. The Coyne School[1] is admittedly one of the leading vocational schools of the United States, and as such was selected by the War Department for training more than 6500 specially chosen military personnel in those expert fields.[2] Buckley's claim against the Coyne School is for approximately $200,000 (R. 323, 326), and is for contingent fees as a purported "agent" in allegedly procuring Coyne's tuition contracts with the War Department. But Buckley had at least three other school contracts for contingent fees (See R. 54 and 328). Buckley therefore gave only part-time services to Coyne for the period of about six months, in Washington, in return for that large claim of contingent fees. During that time Coyne paid Buckley the sum of $4,563.13 on account of such fees (R. 3 and 29).

A further statement of the facts appears in the accompanying Brief.

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[1]Hereafter, for reasons of convenience, the petitioner will be referred to as *Coyne* or *the Coyne School*, and the alleged partnership of the respondents will be referred to as *Buckley*.

[2]The evidence (R. 332) shows a list of 19 schools throughout the country where a total of 48,300 of such specially selected personnel were given extensive and costly training by the Signal Corps in the technical fields mentioned. The Coyne School was regarded by the Government as "in the upper 10%" of this list of schools (R. 17), and it appears (R. 332-3) that it was the top school, except one, in the total number of students trained by it for the Signal Corps.

Coyne's Defense of Illegality

Coyne's major defense is that Buckley's alleged claim is entirely illegal and void under federal law, as being against public policy. Buckley's own testimony shows repeatedly that he persistently tried to get Coyne to sign a formal written contract for his contingent fees; but the record shows that Coyne persistently refused to sign such a formal contract on the ground that such a contract would violate the federal law concerning contingent fees.

The Trial Court Sustains Coyne's Contention of Illegality

The trial below was on the limited question of Buckley's right to an accounting (R. 10). On hearing before a Master more than 2000 pages of evidence were taken and 174 separate exhibits introduced. The Master submitted a report in favor of Buckley. The trial court rejected that report (after a five day hearing on it) and dismissed Buckley's claim "for want of equity." That court entered a "final decree" in which it completely sustained Coyne's contention of illegality. The trial court's judgment specifically found, among other things (R. 44-48), that Buckley's alleged "agency" was—

> "Illegal and void as against public policy, in that it involves the payment of contingent fees for securing War contracts with the Federal Government."

Buckley's Appeal

Buckley took the case to the Appellate Court of Illinois, where the judgment of the trial court was reversed (by a 2 to 1 division) and the case remanded with directions to enter a decree in favor of Buckley "for an accounting." Coyne thereupon tried to take the case to the Supreme Court of Illinois by a petition asking that Court to review the judgment of the Appellate Court. But the State Supreme Court refused even to consider the case, and denied

Coyne's petition for appeal on September 21, 1951.[3] Thereupon the Appellate Court judgment became final for purposes of review in this Court as of the date last mentioned.

Buckley the Sole School "Agent" Operating in Washington

An important point for the purposes of this Petition is the fact that Buckley was absolutely the only school *agent* operating in Washington during World War II, who was attempting to set himself up as a middleman engaged in soliciting these vocational school training contracts on a contingent fee basis. That fact is clearly pertinent in considering the public policy aspects of Buckley's claim, in view of the language of Executive Order 9001, hereinafter mentioned. In all his long testimony as a witness about his activities in Washington, Buckley was not able to mention another individual who was attempting to carry on the same *agency* activities for these vocational schools. Indeed, the record shows positively that there was no other such *agent,* in the entire war effort of the nation; the idea was originated by Buckley and he was playing a lone hand in that

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[3]The Appellate Court of Illinois is "the highest court of the State in which a decision could be had" (under the record in this case) as provided by the Judicial Code 28 U.S.C. Sec. 1257, concerning certiorari from state courts. This is the direct holding in *Chesapeake & Ohio R.R. Co.* v. *Mihas,* 280 U.S. 102 (Ill. 1929); and *Minneapolis etc. R.R. Co.* v. *Rock,* 279 U.S. 410 (Ill. 1929). In those two cases certiorari was granted by the Supreme Court of the United States to the Appellate Court of Illinois.

The rule has been the same in the Supreme Court of the United States for more than three-quarters of a century. See *Gregory* v. *McVeigh,* decided in 1875 and reported in 23 Wall. 294, 23 L. Ed. 156, where the Court said:

> "If a cause cannot be taken to the highest court of a state, except by leave of the court itself, a refusal of the court upon proper application made to grant the leave, is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court."

agency field. Thus the Army officer, Colonel Rooks, who had charge of all preliminary contract recommendations for these vocational schools, testified flatly that Buckley was operating alone, and that he was the only individual in Washington "acting on a commission basis" in an effort to procure these vocational school contracts (R. 337).[4]

Executive Order 9001 Forbidding "Contingent Fees"

It is a matter of common knowledge that the exorbitant contingent fees charged and collected by so-called *agents* for services in procuring war contracts between their principals and the Government have been the subject of much concern to the public and to Congress and to the Administration: first during the Civil War, next during World War I, and especially during World War II. This Honorable Court first took a definite stand in striking down such *agency* contracts as long ago as 1864, in the leading case of *Providence Tool Co.* v. *Norris,* 2 Wall. 45. Later cases in which this Court has spoken in a similar vein on the subject will be discussed in the accompanying Brief.

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[4]Colonel Rooks, the Army officer who was thoroughly familiar with Buckley's activities, as well as the activities of all other vocational schools, said of Buckley:

> "He was the only agent I had any knowledge of acting on a commission basis." (Original Transcript 337.)

Colonel Rooks testified that all the other schools dealt with the Government through their regular full time employees.

Colonel Rooks went further, and said of his talk with Coyne's President, about September 17, 1942 (R. 339):

> "Mr. Lewis told me on one occasion to the effect that he had been led to believe that all his contracts had been coming through as a result of the agency and the intervention of Mr. Buckley and I told him that it was not necessary for anyone to have a representative in Washington, that Buckley had nothing to do with the obtaining of contracts, or words to that effect. . . . Mr. Buckley was never instrumental in obtaining any contracts on behalf of Coyne, to my knowledge."

It is also well known that upon the outbreak of World War II a hoard of such *agents* descended upon Washington, many of them with "their offices in their hats."[5] The whole matter was of such public importance that Congress took note of it in the First War Powers Act of 1941 (Act of December 18, 1941, 55 Stat. 839; 50 U.S.C. App. § 611).

Title II of the First War Powers Act provided in relevant part as follows:

> "*War contracts exempt from certain restrictions upon authorization by President.*
>
> "The President may authorize any department or agency of the Government . . . to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made and to make advance, progress and other payments thereon, without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war . . ."

Executive Order 9001 (6 F.R. 6787) was issued by the President on December 27, 1941, and provided in relevant part as follows:

> "5. Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:
>
> "The contractor warrants that he has not employed any person to solicit or secure this contract upon any

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[5]This expression about agents with "their offices in their hats" applies particularly to Buckley, since he openly admitted on the stand that he had no office in Washington when he claims to have made the contract with the Coyne School, but was operating from the Army and Navy Club in Washington where he lived, and was even using the Club's stationery in soliciting these school contracts. The expression quoted is from the testimony of a Navy Department official before the House Committee on Naval Affairs, April 2, 1943. See printed Hearings of the Committee, 78th Congress, 1st Session, Vol. 1, p. 233.

agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

The purpose of the cited section of the Act, as its title states, was to exempt "war contracts . . . from certain restrictions". These "restrictions" were contained in "provisions of law relating to the making, performance, amendment, or modification of contracts". In general, these "provisions of law" require advertising for bids, opening of bids, performance bonds, and the like.

The purpose of paragraph 5 of the Executive Order relating to the warranty against contingent fees was to protect the Treasury against the inclusion in the contract price of any excessive costs due to fees payable to so-called experts in the procurement field. The Government was aware that the war program would bring with it a tremendous opportunity for profiteering and personal aggrandizement. The problem of acquainting the procurement divisions with sources of supply would create a class of so-called experts who had what might be called the "know how" of war procurement red tape. They knew where to go and whom to see. This facility of "knowing your way around" was something new for manufacturers in the early stages of the war program.

Buckley's "Contingent Fee" Contract Void under General Federal Law

It will be particularly pointed out in the accompanying Brief that Buckley's alleged "contingent fee" contract was

utterly void and illegal under Executive Order 9001, above discussed. But as pointed out in the accompanying Brief, Buckley's alleged "contingent fee" contract was also in clear violation of the settled law of the United States as laid down by this Court. These legal questions are all discussed in the accompanying Brief.

STATEMENT AS TO JURISDICTION

Jurisdiction of this Court generally to review this case is invoked under Section 1257 of the Judicial Code (28 U.S.C. 1257), and particularly by paragraph (3) thereof concerning certiorari to review final judgments or decrees "rendered by the highest court of a State in which a decision could be had."

The particular grounds upon which the judgment of the Illinois Appellate Court (although an intermediate Appellate Court of that State) is reviewable by this Court, are set out in the accompanying footnote.[6]

APPLICATION OF SUPREME COURT RULE NO. 38, PAR. 5(a).

It is respectfully urged that in accordance with the United States Supreme Court Rule No. 38, paragraph 5(a), the Su-

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[6]The judgment of the Appellate Court of Illinois, First District, from which this review is sought, was originally filed June 1, 1951 (R. 363). Thereafter Coyne filed a Petition for Rehearing which was denied by the Illinois Appellate Court June 13, 1951 (R. 363). Thereafter Coyne asked the Illinois Appellate Court for a Certificate of Importance permitting an appeal to the Supreme Court of Illinois, but the Illinois Appellate Court denied that application for review by the highest court of Illinois on June 22, 1951 (R. 363).

Under the applicable statutes of the State of Illinois, Coyne thereupon asked the Supreme Court of Illinois directly to review the case. That Petition for Leave to Appeal to the Supreme Court of Illinois was denied by that Court September 12, 1951 (R. 444). A motion for reconsideration was denied September 21, 1951 (R. 453). Thereafter the judgment of the Appellate Court of Illinois became final and reviewable, as of the date last mentioned, under the Judicial Code of the United States as above cited.

preme Court of the United States exercise its sound judicial discretion and grant a review on writ of certiorari, because the Appellate Court of Illinois, and the Supreme Court of Illinois by its denial of Coyne's petition for leave to appeal, have totally and completely failed to recognize that the validity of contingent fee agreements to procure federal contracts and the interpretation of Executive Order 9001 is a matter of federal law and of federal public policy and not of state law.

The Opinion of the Appellate Court states that the existence of such a contingent fee contract "necessarily presents the following questions for consideration: (1) Is such a contract void in the absence of any evidence that the parties contemplated the use of influence or employment of means contrary to public policy to secure such contracts from the government? (2) Does the contract violate regulation 9001? (3) Does the evidence clearly bring plaintiffs within the exception in regulation 9001?"

In discussing the questions which the Appellate Court Opinion raises, that Court has not directed its attention in any fashion to the fact that all of these issues must be resolved on the basis of federal law and not state law. This despite the fact that a controlling decision of the Supreme Court of the United States was cited to this effect in our brief before the Appellate Court. This decision, which makes the rule eminently clear, is *United States* v. *Allegheny County* (1944), 322 U.S. 174. In that case the Court said:

> "The validity and construction of contracts through which the United States is exercising its constitutional functions, and consequences on the rights and obligations of the parties, the titles or liens which they create or permit, all present questions of federal law not controlled by the law of any state."

In the able and dissenting Opinion of the Court below, another decision of the Supreme Court of the United States is

cited to this same effect, that is, *Sage* v. *Hampe,* 235 U.S. 99, wherein the Supreme Court of the United States reversed on grounds of public policy a judgment of a state court, affirmed by the Supreme Court of Kansas, and said:

> "The case at first sight seems like those in which a State decides to enforce or not to enforce a domestic contract notwithstanding or because of its tendency to cause a breach of the law of some other State. *Graves* v. *Johnson,* 179 Massachusetts 53, 156 Massachusetts 211. But the policy here involved is the policy of the United States. It is not a matter that the States can regard or disregard at their will."

In the most recent federal case on this subject, *Mitchell* v. *Flintkote Co.,* decided January 4, 1951, 185 F. 2d 1003, Judge Swan, speaking for that Court, indicated in positive language that the rule of public policy relating to federal contracts which affect federal policy must be a rule of federal law to insure uniformity, and in this connection said:

> "The Flintkote agreement with Mitchell was made in New York City, and in his brief plaintiff cites two New York cases[7] which indicate that the New York courts would hold Order No. 9001 not decisive of the issues in this case. But this does not alter our conclusion. Order No. 9001 state a federal rule of public policy and federal, not state, law governs its applicability. The 'checkerboard' pattern imposed by *Erie R. Co.* v. *Tompkins* is necessarily unsuited to matters subject to federal regulation, and hence state law does not control the disposition of suits which, although they are between non-governmental parties and are brought in a federal court on the basis of diversity of citizenship, involve interpretation or application of federal law. If, as must be conceded, the national government has power

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[7] *Leahy* v. *Brooklyn Waterfront Terminal Corp.,* 272 App. Div. 781, 69 N.Y.S. 2d 596; *Singer* v. *Bruner-Ritter, Inc.,* 180 Misc. 928, 42 N.Y.S. 2d 881, affirmed 266 App. Div. 953, 44 N.Y.S. 2d 589, appeal denied 266 App. Div. 993, 45 N.Y.S. 2d 411.

> to protect itself against contracts of the kind here in question, the protection afforded must be uniform in all its ramifications, including a uniform rule governing the enforceability of contingent fee contracts between principal and agent."

The grounds of this Petition are substantial, because if the judgment entered against Coyne is allowed to stand, it will constitute a precedent clearly in conflict with the overriding and paramount federal rule. The incidental fact that this case was tried in a state court rather than a federal court does not make valid what the federal courts have uniformly held invalid. The state courts should follow the uniform rule required by the federal decisions, and this case presents the admirable opportunity to this Honorable Court to indicate for the first time that this federal rule is paramount and is decisive and binding upon the state courts.

Conflict of Decisions in the State Courts, Suggesting the Necessity of an Authoritative Announcement by the Supreme Court of the Paramount Federal Law and Federal Policy, Thus Providing a Uniform Rule Throughout the United States.

In New York the courts have applied the so-called State Rule which requires proof of unlawful influence or corrupt means in the performance of the agreement, and they have also applied the federal rule which strikes down these contingent fee agreements for the procurement of government contracts as invalid and against public policy because of their corrupt tendency regardless of the means used in the performance of the agreement. Cases in the first category are:

Leahy v. *Brooklyn Waterfront Terminal Corp.*, 272 App. Div. 781, 69 N.Y.S. 2d 596;

Singer v. *Bruner-Ritter, Inc.*, 180 Misc. 928, 42 N.Y.S. 2d 881, affirmed 266 App. Div. 953, 44 N.Y.S. 2d 589, appeal denied 266 App. Div. 993, 45 N.Y.S. 2d 411;

Bradford v. *Durkee Marine Products Corp.*, 180 Misc. 1049, 40 N.Y.S. 2d 448.

The federal rule was followed in *O'Connor* v. *Hudson River Day Line* (1945), 269 App. Div. 960, 58 N.Y.S. 2d 175.

In Florida the Supreme Court first followed the federal rule in *Wechsler* v. *Novak* (1946), 26 So. 2d 884. In *Robert & Co., Inc.* v. *Mortland* (1948), 33 So. 2d 732, the Court held that a contingent fee for the procurement of a government contract was not invalid, per se, thus departing from its earlier decision.

New Jersey also has expressed divergent views. The highest court of that state, in *Davidson* v. *Button Corp.* (1945), 44 A. 2d 800, affirmed 46 A. 2d 797, followed the federal rule. In *McCabe* v. *Kupper,* (1949), 66 A. 2d 629, a lower court did not follow the federal rule in a case not involving federal procurement, although the federal rule was followed in *Weehauken Realty Co.* v. *Hass,* 13 N.J. Misc. 231, 177 A. 434, also a case not involving federal procurement. In *Stone* v. *Wm. Steinen Co.* (N.J., 1946), 45 A. 2d 486, the court followed the federal rule.

Hall v. *Anderson* (1943), 18 Wash. 2d 625, 140 P. 2d 266, approved a contingent fee for the procurement of federal contracts where there is no proof of undue influence or improper means in the performance of the agreement.

In *Ebeling* v. *Swaine Mfg. Co.* (1948), 357 Mo. 549, 209 S.W. 2d 892, the court held a contingent fee agreement for the procurement of government contracts valid.

In *Glass* v. *Swimaster Corp.* (N.D., 1946), 21 N.W. 2d 468, the Supreme Court of North Dakota upheld the validity of a contingent fee agreement.

Conflict in Federal Decisions Arising from Misinterpretation of Oscanyan v. Winchester Repeating Arms Co. (1880), 103 U.S. 261, also Suggesting the Need for an Authoritative Clarification by the Supreme Court on This Important Matter of Public Policy.

Oscanyan v. *Arms Co.* is discussed hereafter in the accompanying Brief. Some courts have considered the dictum in that case as a modification of the so-called federal rule which holds invalid, per se, any agreement for the procurement of government contracts on a contingent fee basis. Thus, *J. E. Hanger, Inc.* v. *Fitzsimmons* (1921), 273 F. 348, held valid a contingent fee agreement, relying on the language found in *Oscanyan* v. *Arms Co.* *Dodge* v. *Allison* (1926), 13 F. 2d 588, also erroneously viewed the *Oscanyan* decision as a departure from the doctrine announced in *Providence Tool Co.* v. *Norris* (1864), 2 Wall. 45.

In *Noonan* v. *Gilbert* (1934), 68 F. 2d 775, the Court refused to allow the taxpayer a deduction for federal income tax purposes for the amount of contingent fees paid for the procurement of government contracts.[8] On the other hand, without citing this case, the Tax Court in *Aetna Standard Engineering Co.* v. *Commissioner* (1950), 15 T.C. ....., No. 42 (CCH Dec. 17,847), allowed such fees as a proper deduction.

Of course, there is a long line of decisions in the Courts of Appeal of the various circuits following the federal rule, denying the validity of contingent fee agreements for the procurement of government contracts.

Mitchell v. *Flintkote Co.* (1951), (CA. 2) 185 F. 2d 1003;

Reynolds v. *Goodwin-Hill Corp.* (1946, CA. 2), 154 F. 2d 553;

Bradley v. *American Radiator & Standard Sanitary Corp.* (1947, CA. 2), 159 F. 2d 39;

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[8]See also, *Textile Mills Securities Corp.* v. *Commissioner* (1941) 314 U.S. 326, 338.

Silverman v. *Osborne Register Co.* (1946, C.A., D. Col.), 155 F. 2d 879;

United States v. *Paddock* (1949, CA7), 178 F. 2d 904, rehearing denied 180 F. 2d 121;

McNeill v. *Nevious* (CA D. Col. 1950), 187 F. 2d 81;

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Gesellschaft Fur Drahtlose Telegraphie MBH v. *Brown*, (C.A., D. Col.) 78 F. 2d 410;

Brown v. *Gesellschaft Fur Drahtlose Telegraphie MBH*, 104 F. 2d 227, certiorari denied 307 U.S. 640.

We respectfully suggest that the conflict of decisions in the state courts arises from the unfortunate dictum appearing in *Oscanyan* v. *Arms Co.* This present case presents for the first time an opportunity for this Court to provide a definite and positive rule with respect to these contingent fee agreements and to clarify the statements appearing in *Oscanyan* v. *Arms Co.*, and thereby provide a uniform rule for the federal and state courts with respect to contingent fees for the procurement of federal contracts.

MAJORITY AND MINORITY OPINIONS BELOW

The Majority Opinion of the Appellate Court of Illinois (2 to 1) and also the Opinion of the dissenting Justice in that Court are set out in the Record at pages 419-443. Those Opinions are also reported in 343 Ill. App. 420, 99 N.E. 2d 370.

THE QUESTIONS PRESENTED

The questions presented on this Petition may be stated as follows:

1. Is not Buckley's claim entirely illegal and void, as against public policy, in that "it involves the payment of

contingent fees for securing War contracts with the Federal Government"? (See the holding of the trial court, R. 47.)

2. Is not the holding of the Appellate Court of Illinois (in reversing the trial court) in conflict with the general doctrines of law concerning contingent fees for war contracts laid down by the federal courts? (See *Mitchell* v. *Flintkote Co.*, 185 F. 2d 1003.)

3. Is Buckley a "bona fide established commercial or selling agency maintained by the contractor", within the meaning of Executive Order 9001, in view of the fact that (i) his employment by Coyne was for the sole purpose of procuring federal contracts, (ii) the agreement did not contemplate any continuing relationship with Coyne and in fact provided a limited existence, (iii) Buckley had never been previously employed by Coyne as a selling agent, and (iv) Buckley was not engaged generally to solicit students in behalf of Coyne?

4. Is the judgment of the Appellate Court of Illinois erroneous because it did not follow the paramount federal law consistently announced in the decisions of this Court?

REASONS FOR ALLOWANCE OF CERTIORARI

1. The state court here has decided a federal question of substance and importance in a way not in accordance with the applicable decisions of this Court.

2. This Court is here presented squarely (and for the first time, it is believed) with the question of construing and applying Executive Order 9001 in such important cases as the one at bar; accordingly this Court should determine and settle the law with respect to that important Presidential regulation.

3. The present state of the law with respect to the construction and application of Executive Order 9001 is un-

certain and controverted, and that uncertainty should be settled by this Honorable Court.

CONCLUSION

For the reasons set forth above, your petitioner respectfully prays that a writ of certiorari be issued, directed to the Appellate Court of Illinois, First District, commanding that Court to certify and send to this Court for review and determination a full and complete transcript of the record and of all proceedings therein in Case No. 45259 in that Court; and that upon review by this Honorable Court the judgment of the last named Court may be reversed; and that your petitioner may have such other and further relief in the premises as may be meet and just.

Respectfully submitted,

COYNE ELECTRICAL SCHOOL, INC.,
Petitioner,

By IRWIN N. WALKER

PETER B. ATWOOD
Its Attorneys

URBAN A. LAVERY
Of Counsel

Dated at Chicago
December 5, 1951.

NO. .....

IN THE

Supreme Court of the United States

COYNE ELECTRICAL SCHOOL, INC.,
Petitioner,

VS.

F. J. BUCKLEY AND E. H. BUCKLEY, DOING BUSINESS AS F. J. BUCKLEY AND COMPANY,
Respondents.

BRIEF IN SUPPORT OF FOREGOING PETITION

THE FACTS IN THIS CASE DEMONSTRATE BEYOND QUESTION THAT BUCKLEY'S CLAIM FOR CONTINGENT FEES FOR HIS "AGENCY" IN PROCURING FEDERAL CONTRACTS VIOLATES THE PUBLIC POLICY OF THE UNITED STATES AND EXECUTIVE ORDER 9001.

SHORT STATEMENT OF THE FACTS

On March 11, 1942, Lewis, President of the Coyne School, met Buckley in Washington for the purpose of discussing Signal Corps training contracts and the possibility of employing Buckley as Coyne's agent to procure Signal Corps training contracts on a contingent fee basis (R. 60-68). Prior to that meeting Coyne had already procured two government training contracts, one of which it had just recently procured for the training of 200 Signal Corps troops at the Coyne School at 25¢ per student hour (R. 63).

At this meeting Buckley stated to Lewis that he had recently procured a contract in behalf of National Schools at 40¢ an hour (R. 61). Lewis wrote two letters to Buckley personally (Pls. Ex. 4 and 5, R. 68-69). These letters Lewis handed to Buckley in Washington on March 14, 1942. Pls. Ex. 4 was a mere letter of introduction, so that Buckley would not have to disclose to the Army personnel his contingent fee arrangement. Pls. Ex. 5 provided for a contingent fee for the procurement of government contracts at the rate of 35¢ or more per man-hour of instruction. Coyne never secured a contract at this rate.

Prior to World War II, Buckley had no experience in this highly technical field of vocational training. His business for years had been that of a real estate broker in Los Angeles, California.[1] He had never represented a vocational training school, and prior to the war had never negotiated contracts with the United States Government for anyone. Buckley's experience in representing schools and in procuring contracts with the United States Government for technical war training is illustrated by the following question and the answer thereto (Original Record, p. 628; omitted from Record):

> "Q. Prior to the month of September, 1941, how much skill and experience did you have and acquire in representing schools who might be prospective contractors with the government for this work that the Coyne was doing eventually for the government, Mr. Buckley?
>
> "The Witness: I did not have any and did not represent that I had any."

[1]The original transcript shows three photographs of Buckley's real estate office in the outskirts of Los Angeles (R. 59, 68; Defts. Ex. 2, 3 and 4). Those photographs give a good visual impression of Buckley's business activities from the year 1922 down to the time he went to Washington.

In view of the dominant issue of public policy in wartime involved in this case, it is also pertinent to contrast Buckley's pre-war earnings with the lush and extravagant contingent fees claimed in this case. On cross-examination Buckley was forced to admit that during the pre-war years of 1939 and 1940 his total business income (that is, "gross" income before deducting expenses) ran from $10,000 to $15,000 for each of those years.[2] In contrast with these modest figures, Buckley testified he expected to recover around $200,000 in this case—which would be for part-time services for about six months' work in Washington, in wartime.

From the time Lewis first met Buckley until June 1942, Buckley did not have any office in Washington. In order to have a place to receive his calls, he used the facilities of the Army and Navy Club in Washington.[3]

According to the complaint in this case, and as established by the testimony, Buckley's representation of Coyne was limited to the procurement and so-called servicing of contracts with the United States in connection with the war training program. He did not represent Coyne generally in the procurement of students, and was not in any sense a salesman, representative or broker of the Coyne School.[4]

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[2]See Original Record pp. 541-547.

[3]Buckley's letters from the time he went to Washington in January 1942 down to June 1942, are all written on the letterhead of the Army and Navy Club. See his own Exhibits Nos. 26, 27, 28, 31, 32, 37, 41, 42 and 57. Buckley's Exhibit 63 shows that it was not until June 3, 1942 that he acquired his own office in the Union Trust Building in Washington, and for the first time had a letterhead of his own.

[4]The Coyne School had never in its entire history employed any "agent" whatever to solicit students, but on the contrary had always relied exclusively on advertising to secure its students. Mr. B. W. Cooke, the President of the Coyne School, testified positively to that effect. He said Buckley was the first person ever to represent them in such a "similar employment". (See R. 344.)

The question that occurs to any practical person is, Why would a school such as Coyne, which ranked among the upper 10% of all the schools in the country qualified to participate in this military program, ever engage Buckley, a total outsider and who admittedly according to his own testimony, knew nothing about vocational training prior to the war? The answer is simple: It was an intimation that Buckley's influence would have an effect upon the letting of government contracts for the training of students in private vocational schools. This is particularly so in view of the fact that Coyne had already procured two contracts with the United States Government for the training of military students at its school; one of these had been procured in 1941, and the other committed on March 3, 1942 as a result of conferences which Lewis had with Colonel Rooks as early as January 1942. Nor can we treat too lightly the fact that Buckley was a captain in World War I (R. 50-51), and that he would use to advantage such acquaintances as those associations created. His friendship with the procurement officers[5] on the day of Lewis' first visit with Buckley extremely impressed Lewis, even according to Buckley's own statement: "He [Lewis] said he was favorably impressed with the attitude displayed by Major Rooks and he said he was pleased with the apparent friendly attitude that existed in relation to myself and that office." It was this friendly attitude which prompted Lewis to ask Buckley, "Can you not get me 35 cents or 40 cents for these 200" (Lewis had previously agreed with Rooks to train military students for 25¢ an hour). To this Buckley replied, "And I said I would do my best to do so . . ." (R. 64-65).

It appears clear that Buckley sold Lewis on the idea at that first meeting on March 11, 1942 in Washington that Lewis' price to the Signal Corps of 25¢ an hour was too

[5]See, for example, R. 54: "I did not limit myself to any particular branch of the Army. My contracts were quite general."

low, and that Buckley could get higher rates. In anticipation of that assurance from Buckley, Lewis agreed to pay Buckley 5¢ per man-hour on all contracts for 35¢ or more per hour. The inference is clear, and, indeed, Buckley's own testimony shows, that Buckley's efforts on behalf of Coyne were not primarily to secure troops for training, as Coyne had demonstrated its own ability on that point, but to secure a higher price per man-hour of instruction. On this point Buckley testified: "I told him since the one contract I had at that time was 40¢ an hour for the same type of radio training that I hoped to get the same for him, and he said he would gladly pay the 5¢ an hour." (R. 61.)

This "hope" did not come to pass, and it soon became apparent from conversations with Colonel Rooks that Coyne would not be given any contracts for the training of troops at 35¢ or more per man-hour of instruction. This made it necessary for Buckley to persistently belabor Lewis for a modification of the March 12, 1942 agreement to provide him with a contingent fee for government training contracts procured by Coyne at a lower tuition rate. Shortly after the March 12, 1942 meeting, Coyne by its own efforts did procure a contract from the United States Government for the training of 800 Signal Corps troops at rates of 27¢ and 32¢ per man-hour of instruction.

Buckley came to Chicago March 21, 1942 (R. 77) for the purpose of getting his commission agreement modified to cover the 800-student contract which Coyne had then received. Buckley himself at that conference in Chicago typed a letter which he asked Lewis to sign (Pls. Ex. 9, R. 80-82), which would have reaffirmed the 5¢ per man-hour contingent fee, would have paid Buckley 2¢ and 3½¢ per man-hour on the 800-student contract, and would have expressed Coyne's hope that future contracts would be received at a higher rate. *This draft letter Lewis absolutely refused to sign* (R. 80).

Buckley's own testimony shows that he continued thereafter to insist that the arrangement between himself and Coyne must be reduced to writing. Thus, some days later, in a long letter from Los Angeles, on March 30, 1942 Buckley urged a further revision of his March 21 draft proposal; he asked Lewis to insert therein some fictitious language designed solely to plow around Executive Order 9001. This purpose is pretty obvious because Buckley himself testified he first learned of Executive Order 9001 on March 29, 1942 (R. 315). Lewis, however, completely ignored such devious methods. On April 25, 1942, Buckley again wrote Lewis (Pls. Ex. 32, R. 123) asking Lewis to write him "two letters", one of which was simply to be a self-serving statement to supplement the March 12, 1942 letter and the other to comprise the proposed commission contract on the 800-student government contract, and said:

> "It seems that it would be advisable for you to send me two personal letters. One dated around March 15th stating in substance, that supplementing your letter of March 12, 1942, you appointed me with the full knowledge that I have no Political or other influence with Government Officers and that I have a bona fide sales and commercial organization and that my executive ability and business knowledge of conditions in Washington, due to my experience there should be helpful. The second letter should be dated prior to April 20th and simply state that the fee to be paid to me will be .02¢ per hour per man for Operators and .03½¢ per hour per man for Mechanics *on this particular group of 800, as per our agreement.*" (Italics supplied.)

Lewis again ignored this devious suggestion.

Here is the first clear evidence (less than three weeks after the parties had first met) showing that Buckley realized his entire arrangement for a contingent fee contract was on very dangerous ground. *Lewis consistently refused to follow any such suggestion or to sign any document containing such fabricated recital.*

SUMMARY OF ARGUMENT

UNDER THE FACTS AS STATED, ANY AGREEMENT TO PAY BUCKLEY A CONTINGENT FEE FOR PROCURING FEDERAL CONTRACTS IS WHOLLY VOID AS AGAINST PUBLIC POLICY.

This Honorable Court has consistently and flatly ruled that any agreement to pay a contingent fee for the solicitation of government contracts is wholly void and against public policy, whether or not there is present any undue influence or improper means in the solicitation of such contracts. By Executive Order 9001 Buckley is also foreclosed in his claim for contingent fees because he is not a "bona fide established agency maintained by the contractor". This conclusion follows from the fact that Buckley was never "maintained" by the contractor as such. The letter of March 12, 1942 simply provided for Buckley's agency for a period of one year with respect to the procurement of certain defined government contracts. Prior to that time Buckley had never been employed by Coyne, and his agency was limited to procurement of federal contracts. He did not in any sense represent Coyne as a general agent to solicit students generally for Coyne.

ARGUMENT

I

FEDERAL LAW, NOT STATE LAW, CONTROLS THIS CASE

The major error of the Majority Opinion below in sustaining the legality of Buckley's claim grows out of the primary error of that Court in applying the state law of Illinois to the case, rather than federal law. In taking that position the Majority Opinion cites and relies solely on

certain state court decisions[6] and ignores entirely all applicable federal decisions including the controlling decisions of this Court which will be discussed under Point II of this Brief.

This Point I is fully covered in the foregoing Petition under the heading, "Application of Supreme Court Rule No. 38, Par. 5(a)." That comment we think clearly demonstrates the error of the Court below in applying state law rather than federal law in arriving at its decisions, and accordingly we say no more about this phase of the case in this Brief.

II

THE ILLINOIS COURT TOOK A TOTALLY ERRONEOUS VIEW OF THE FEDERAL PUBLIC POLICY FORBIDDING FEES TO AGENTS FOR PROCURING GOVERNMENT CONTRACTS.

The second major error of the Majority ruling of the Illinois Court below was its totally erroneous view of the federal public policy forbidding contingent fees to agents under circumstances like those in which Buckley finds himself in this case. The majority of the Illinois Court held that Buckley's alleged contract for contingent fees would not be illegal unless there was direct evidence that "political or personal influence" was used or intended by the parties. Such is the express holding of the Majority Opinion below. And since there was no proof of such "influence," the Majority below held in favor of Buckley on this question of public policy.

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[6]The Majority Opinion cites and relies upon the following five state cases, in spite of the fact that these cases are totally irreconcilable with the federal rule: the Illinois case of *Lewy* v. *Standard Plunger Elevator Co.*, 296 Ill. 295, 129 N.E. 775; the Missouri case of *Ebeling* v. *Swaine Mfg. Co.*, 209 S.W. 2d 892; and three cases from New York, *Bradford* v. *Durkee Marine Products Corp.*, 40 N.Y.S. 2d 448; *Singer* v. *Bruner-Ritter, Inc.*, 42 N.Y.S. 2d 881; and *Leahy* v. *Brooklyn Waterfront Terminal Corp.*, 69 N.Y.S. 2d 596.

This Honorable Court since the Civil War, has uniformly held in the cases in which this doctrine called for expression, that this rule of public policy applies, irrespective of whether or not the parties to such employment contract actually contemplated the use of, or used, improper means, solicitation or influence in the procurement of such contracts. This rule may be described as the federal rule, and has been followed by many of the state courts.

Under such contingent fee agreements it was early seen that a vicious element is introduced under which the plaintiffs' compensation is measured by the amount of the contract and not by the value of the services performed. The fact that the compensation is dependent upon the success of the venture is a tremendous inducement to the agent to take whatever steps are necessary to secure the desired object, including the use of improper influence upon public officials. Thus is violated the primary rule of public policy that the only consideration which should enter into the letting of government contracts is the procurement of the best services or goods at the best price.

It would be simple enough to adopt the principle that only where an agent actually employed improper influence to secure a government contract would he be denied recovery upon a contingent fee agreement were it not for the fact that when improper means are employed or improper influence is brought to bear upon public officials to secure government action, it is almost always well concealed. For this reason, the courts have not found it practicable to draw any distinction between actions upon contracts in the performance of which improper influence was used and those in which it was not, for more often than not, the court would be unable to discover the presence of improper conduct. The only way to insure against such practice is

to deny validity entirely to all contingent fee arrangements for the purpose of obtaining government contracts.

The Doctrine of Public Policy Established by This Court

This doctrine has been formulated by this Court in three leading cases. These are, *Providence Tool Co.* v. *Norris* (1864), 2 Wall. 45, 69 U. S. 45; *Oscanyan* v. *Arms Co.* (1880), 103 U. S. 261; and *Hazelton* v. *Sheckells* (1906), 202 U. S. 71. In another series of three leading cases, all dealing with contingent compensation to attorneys for purely professional services in connection with claims against the United States, this Court took occasion to explain and to distinguish the doctrine first announced in *Providence Tool Co.* v. *Norris*. These cases are, *Trist* v. *Child* (1874), 88 U. S. 441; *Wright* v. *Tebbitts* (1875), 91 U. S. 252; and *Stanton* v. *Embrey* (1876), 93 U. S. 548. In two other cases this Court reaffirmed the doctrine of *Providence Tool Co.* v. *Norris*, but found it inapplicable in the case of the solicitation of government contracts by principals as distinguished from the solicitation of government contracts on a contingent fee basis by agents. These cases are, *Valdes* v. *Larrinaga* (1914), 233 U. S. 705, and *Steele* v. *Drummond* (1927), 275 U. S. 199.

A brief summary of each of these cases and of the more recent decisions of the Supreme Court of the United States follows.

The doctrine that any agreement to pay an agent a fee contingent upon the success of procuring a government contract is void and against public policy was first announced in the opinion of Mr. Justice Field in *Tool Co.* v. *Norris* (1864), 2 Wall. 45, 69 U. S. 45. In this case Norris much like Buckley struck upon the idea that Washington would be a good place to go to for the purpose of exploiting the war program. The Civil War was then in progress, and

Norris who had had no previous dealing with the United States Government and had never solicited contracts with the United States Government came to Washington for the express purpose of exploring the possibility of getting contracts with the War Department (p. 46). For this purpose Norris exerted every effort to have influential persons, including Senators, introduce him to the Secretary of War, and he finally got a contract with the War Department for muskets. His employment contract with the Providence Tool Company was for so much per musket, contingent upon the success of getting a contract with the United States Government. Mr. Justice Field, stated this Court's position emphatically in these words (p. 54):

> "The question, then, is this: Can an agreement for compensation to procure a contract from the Government to furnish it supplies be enforced by the court? We have no hesitation in answering the question in the negative. . . .
>
> ". . . *Agreements for compensation contingent upon success, suggest the use of sinister and corrupt means for the accomplishment of the end desired. The law meets the suggestion of evil, and strikes down the contract from its inception.* . . .
>
> ". . . all agreements for pecuniary considerations to control the business operations of the government, . . . are void as against public policy, *without reference to the question, whether improper means are contemplated or used in their execution. The law looks to the general tendency of such agreements, and it closes the door to temptation, by refusing them recognition in any of the courts of the country.*"

Several years later this Court in *Oscanyan* v. *Arms Co.* (1880), 103 U. S. 261, had occasion to consider again the identical problem presented in the *Tool Co.* case. In this case the plaintiff was consul-general to the Turkish govern-

ment at the port of New York. The Turkish government was then sending a mission to the United States for the purpose of making a survey of firearms. The head of that mission was a personal friend of the consul-general, who through his influence was able to get the special envoy of the Turkish government to recommend defendant's rifles. However, before the recommendation was made the consul-general secured an agreement from the defendant to pay him a fee for the procurement of contracts with the Turkish government, contingent upon the success of such procurement. This statement of the case summarizes plaintiff's counsel's opening statement to the court and to the jury, and on the basis of this opening statement defendant's counsel moved for a directed verdict, which the trial court promptly granted.

Mr. Justice Field again spoke for the court, and in affirming the decision of the trial court, based the Court's decision squarely upon *Tool Co.* v. *Norris, supra.* The Court held that the contract was unenforceable and void and against public policy because of the corruptive tendency of contingent compensation contracts for the procurement of government business.

The doctrine was crystalized in *Hazelton* v. *Sheckells* (1906), 202 U. S. 71. Mr. Justice Holmes delivered the opinion in that case, in which the plaintiff had an option upon a certain parcel of property which Congress was then considering using for the location of a hall of records and the time limit of the option was the term of the then present session of Congress. Obviously, the plaintiff in that case would not exercise the option unless he had sold the property first to the Government at a higher price, and in this connection the contract between plaintiff and defendant contemplated that the plaintiff would perform extensive services in order to induce Congress to accept the plot. No political influence was suggested or intimated. Concerning

these extended services which were contemplated by the agreement, Mr. Justice Holmes said:

> ". . . We assume that they were legitimate, but the validity of the contract depends on the nature of the original offer, and whatever their form, the tendency of such offers is the same. The objection to them rests in their tendency, not in what was done in the particular case. Therefore, a court will not be governed by the technical argument that when the offer became binding, it was cut down to what was done, and was harmless. The *court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward. Marshall* v. *B. & O. R. R.*, 16 How. 314, 335, 336."

This Court has had occasion to give expression to the federal rule in two additional cases. These are *Muscahny* v. *United States* (1945), 324 U. S. 49, and *American Seating Co.* v. *Zell* (1944), 322 U. S. 709.

The *Muscahny* case involved an attempt on the part of the Government to apply the doctrine of *Tool Co.* v. *Norris* in a situation in which the United States Government itself had agreed to pay a contingent fee. This the Government contended was against public policy, and that the contingent fee was necessarily a part of the option price and therefore vitiated the entire agreement. This argument a majority of the Court refused to follow, on the theory that the Government was setting up its own policy and that this Court could not in effect determine a matter of public policy for the Government itself without a supporting statute. However, the Court cited with approval the doctrine of *Tool Co.* v. *Norris,* and in this connection said:

> "Contingent fee contracts to secure Government business for the employer of the recipient have been

held invalid because of their tendency to induce improper solicitation of public officers and the exercise of political pressure. *Steele* v. *Drummond,* 275 U. S. 199."

In further support of this rule, the Court cited *Trist* v. *Child; Hazelton* v. *Sheckells,* and *Crocker* v. *United States* (1916), 240 U. S. 74.

In *American Seating Co.* v. *Zell* (1944), 322 U. S. 709, Mr. Zell, in October, 1941, called upon the American Seating Company at its request to discuss the question of procurement of Government contracts in connection with the war program. These discussions led to the execution by the company of a letter of employment at a fixed compensation of $1,000 per month, to include expenses. The plaintiff, Mr. Zell, in an affidavit accompanying a motion for summary judgment, stated that over and above the letter there was an oral agreement to pay him from 3% to 8% of the contract price on any Government contracts which he might procure in behalf of American Seating Company.

In the District Court, 50 F. Supp. 543, and in the Court of Appeals, 135 F. 2d 641, the case went off on the issue of the parol evidence rule, it being contended that the written contract was complete on its face and had been performed and that no evidence of the parol agreement could be admitted. The complaint was dismissed in the District Court, the judgment being reversed by the Court of Appeals. Upon the granting of *certiorari* by the Supreme Court of the United States, the case was extensively briefed, both upon the parol evidence rule and the contention that the contract, shown by Zell's affidavit, was contrary to the public policy rule of the United States, and void. Mr. Zell, in his affidavit, went to great lengths to point out his previous experience and the substantial executive position he then held, under which his compensation ran to $57,000 an-

nually, prior to entering into the agreement with American Seating Company. He had considerable skill and experience in the procurement of large industrial contracts. He was an able engineer and technician.

This Court in a *per curiam* opinion indicated that two of the Justices were of the opinion that the judgment of the Court of Appeals should be affirmed. Seven were of the opinion that the judgment should be reversed and the judgment of the District Court affirmed—four because proof of the contract alleged in the plaintiff's affidavits is precluded by the applicable state parol evidence rule, and three "because the contract is contrary to public policy and void; see *Tool Company* v. *Norris*, 2 Wall. 45, 54, 17 L. Ed. 868; *Hazelton* v. *Sheckells*, 202 U. S. 71, 79, 26 S. Ct. 567, 568, 50 L. Ed. 939, 6 Ann. Cas. 217; Executive Order No. 9001, Tit. II, par. 5, 6 Fed. Reg. 6788, 50 U.S.C.A. Appendix § 611 note; War Department Procurement Regulations, 10 Code Fed. Reg. (Cum. Supp.), sec. 81.1181."

This case represents the latest statement of this Honorable Court in support of the federal rule of public policy first announced in *Tool Co.* v. *Norris*.

In two cases, *Valdes* v. *Larrinaga* (1914), 233 U.S. 705, and *Steele* v. *Drummond* (1927), 275 U.S. 199, representing the third group of cases on this subject mentioned above, this Court held that where individuals participate in a joint venture, as principals, to procure a government contract, the fact that one of the principals' interest in the venture is contingent upon securing the contract does not invalidate the joint venture agreement. Neither of these cases supports Buckley's claim.

In the *Valdes* v. *Larrinaga* case, the plaintiff was engaged to assist in procuring a franchise for the purpose of developing electric power, and in this connection he was to help in such things "as plans, projects, and in everything

concerning the technical part thereof". For this purpose he was to receive a 10% interest in the profits of the franchise. Mr. Justice Holmes held that this contract did not violate public policy under such decisions as *Hazelton* v. *Sheckells,* 202 U.S. 71. The opinion of the Court in that case was delivered by Justice Holmes, and he, of course, was well aware of the very positive statements which he made in that opinion concerning the invalidity of contingent fee agreements.

That same situation applies in *Steele* v. *Drummond,* 275 U.S. 199. The distinction between this kind of a case and the procurement of a contract on a contingent fee basis is clearly set forth by the Court itself in the following comments:

> "The contract here under consideration is to be distinguished from those dealt with in *Tool Company* v. *Norris,* 2 Wall. 45; *Trist* v. *Child,* 21 Wall. 441; *Meguire* v. *Corwine,* 101 U.S. 108; *Oscanyan* v. *Arms Co.,* 103 U.S. 261; *Hazelton* v. *Sheckells,* 202 U.S. 71; and *Crocker* v. *United States,* 240 U.S. 74. The claims there considered were under contracts requiring or contemplating the obtaining of legislative or executive action as a matter of favor by means of personal influence, solicitation, and the like, or by other improper or corrupt means.
>
> "But this case is different. Drummond was not employed by Steele or by the railroad company to secure the passage of the ordinances. *He was interested as an owner of property.*"

The Court thus pointed out that both of the parties were acting as principals, each for his own benefit, and the situation was not at all like the contingent fee cases illustrated by *Tool Co.* v. *Norris* and the related cases.

The distinction here urged in these cases is recognized in the dissenting Opinion, but is not discussed in the Majority Opinion of the Appellate Court.

The Binding Rule for All the Courts—State and Federal

If the case at bar had been tried in a federal court in Illinois (as there was a clear right to do since Buckley is a resident of California), the doctrine of *Tool Co.* v. *Norris* and the other cases cited above would have been applied to Buckley's claim, and his alleged contract would promptly have been pronounced illegal and void. Buckley's claim was actually held illegal and void by the final decree of the trial court, which specifically so held, and dismissed Buckley's claim "for lack of equity" (R. 48). The able dissenting Opinion in the Illinois Appellate Court holds that the trial court judgment should have been affirmed. The result is that of the four Illinois Judges who have passed upon this case two have held Buckley's claim illegal and void on the ground of federal public policy, while two of these Judges (who happen to be a majority of the Appellate Court) have ruled the other way.

In view of the clear conflict between what would have been the result of this case if tried in the federal court in Illinois and the result which is shown by this Record, it would seem appropriate for that reason alone, we say, that this Court should grant certiorari and review the judgment below. It should not be possible that in a state such as Illinois there can be any "checker-board pattern"[7] as to the decisive rule of public policy applicable to this case. All the courts in Illinois, state and federal alike, should be bound by the doctrine which this Court has repeatedly announced, that contingent fee contracts like that claimed by Buckley are entirely illegal and void. This should be the law notwithstanding the claimed mitigating fact which the Majority Opinion found that Buckley was not guilty of

[7]See the use of this helpful phrase, "checker-board pattern" in the able Opinion of the United States Court of Appeals for the Second Circuit in the recent *Flintkote* case cited and discussed in Point III of this Brief.

FILED
JAN 10 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 473

COYNE ELECTRICAL SCHOOL, INC.,
Petitioner,

vs.

F. J. BUCKLEY AND E. H. BUCKLEY, Doing Business As F. J. BUCKLEY AND COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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"political or personal influence" in his activities in Washington. The mere fact of such activities alone makes it necessary to strike down his claim for the large amount of fees he would be awarded if the decision of the Appellate Court of Illinois is permitted to stand.

III

THE GENESIS AND INTENT OF EXECUTIVE ORDER 9001

Executive Order 9001 (6 F.R. 6787) was issued by the President on December 27, 1941, and provided in relevant part as follows:

> "5. Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:
>
> "The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, percentage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

Paragraph 5 of the Executive Order did not disturb sound commercial practices existing prior to the war. Its plain purpose was to protect the Treasury of the United States from the cost of fees for questionable services of questionable value. This is best explained by the comment of Judge Learned Hand, speaking for the Court in *Reynolds* v. *Goodwin-Hill Corp.* (1946, CA2), 154 F. 2d 553, where he said (p. 555):

> "The critical words are: 'bona fide established commercial or selling agencies maintained by the contrac-

> tor for the purpose of securing business,' . . . The purpose of the section is reasonably plain: the payment of contingent fees was permitted when made to an agent *employed generally to drum up business for the contractor,* presumably because it was thought wise to allow contractors to do business in their accustomed way, in spite of the possibility that the inducement of a commission might on occasion result in abuses. But it was also thought that *to employ persons to procure specific contracts upon a contingent fee,* was likely to result in selecting those who had, or were supposed to have, some especial access to officials; and that this *could not be tolerated.*" (Italics supplied.)

As we have pointed out above, Buckley could not possibly come within the exception provided in the Executive Order, as his employment was limited to the procurement of government contracts, and a contingent fee for this purpose, as Judge Hand points out, "could not be tolerated."

Decisions Under Executive Order 9001

This Honorable Court has not had occasion to consider the purpose and effect of Executive Order 9001 in this context. *All* of the decisions of the Courts of Appeal sustain the contention made by Coyne both in the Petition and in this Brief that under no circumstances can Buckley be considered a bona fide agent under Executive Order 9001. These cases further follow the rule announced in the decisions of this Court that a contingent fee agreement to pay for the solicitation of federal contracts is wholly void.

Reynolds v. *Goodwin-Hill Corp.,* did not directly pass upon the question of public policy, but found that the plaintiff in that case was within the exception provided in Executive Order 9001. The plaintiff in that case sued for commissions due him as a sales agent of the defendant for procuring contracts on its behalf with the United States Army Engineer Corps. The trial court found that the

plaintiff was the general sales manager or general sales agent of the defendant company and had held this position for many years, with authority to solicit business for the defendant in all phases of its business, both civilian and government. Under these circumstances the Court felt that the plaintiff came within the exception.

For some reason which we find difficult to understand, the Majority Opinion of the Appellate Court does not make mention of the decision of the Court of Appeals for the same Circuit, decided a year later, in *Bradley* v. *American Radiator & Standard Sanitary Corp.*, 159 F. 2d 39, where the court pointed out:

> "The exception [Executive Order 9001] creates a privileged class who may receive contingent fees for securing government contracts, while others may not. Not only should grants of special privilege be jealously restricted, but such a restriction is also in the interest of maintaining the integrity of governmental contracting procedure. Moreover, the use of the words 'maintained by the contractor' suggests an intention to restrict the exception to continuing relationships between the contractor and his agent. The contract alleged in the complaint violates the public policy declared in the Executive Order."

It will be noted that the court used the words "specific contracts" advisedly, as there the plaintiff was engaged to procure as many orders as possible from the Government and he was highly successful in that venture. Nevertheless, the court found the claim invalid because the plaintiff's efforts were confined to procuring government contracts. This conforms to the practical aspects of government procurement, as it is more likely that the agent would be employed to procure as many government orders as possible rather than a single contract. The vice of the contingent fee is not overcome simply by multiplying his activities.

The Controlling Flintkote Case

The case of *Mitchell* v. *Flintkote Co.*, 185 F. 2d 1003 (CA 2), deserves special discussion in this Brief. That case was not decided until January 4, 1951, a few weeks after the Buckley case had been argued and submitted to the Illinois Appellate Court. That circumstance we suggest was highly unfortunate since the Illinois Court did not have the benefit of the able and decisive opinion in that case. The plain fact is that the *Flintkote* case directly contradicts the holding of the Illinois State Court in the Majority Opinion below. The Illinois Court had held, by a rather legalistic process of argument, that Executive Order 9001 did not apply in the Buckley case, or if it did, that Buckley came within the "exception" of that Order. In the *Flintkote* case, under an almost identical situation so far as the question of legality is concerned, the able federal Court held directly to the contrary and said:

> "Executive Order 9001 is rigorous in its requirements. The Order flatly requires that no person be employed on contingent fee 'to solicit or secure' the contract . . .
>
> "The Flintkote agreement with Mitchell was made in New York City, and in his Brief plaintiff cites two New York cases which indicate that the New York Courts hold Executive Order 9001 not decisive of the issues in this case. But this does not alter our conclusion. *Order 9001 states a Federal rule of public policy and Federal, not State, law governs its applicability.*" (Italics added.)

It should be stated here that the opinion in the *Flintkote* case cites the New York cases to which it refers[8] in the above quotation, and then continues:

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[8]These New York cases *(Leahy* v. *Brooklyn, etc.*, 69 N.Y.S. 2d 596; and *Singer* v. *Bruner-Ritter, Inc.*, 42 N.Y.S. 2d 881, affirmed 44 N.Y.S. 2d 589) are cited and quoted by the Majority Opinion of the Illinois Appellate Court, in support of its holding on the case at Bar.

> "The 'checker-board' pattern imposed by *Erie R. Co.* v. *Tompkins* is necessarily unsuited to matters subject to federal regulation, and hence state law does not control the disposition of suits which . . . involve interpretation or application of federal law. If, as must be conceded, the national government has power to protect itself against contracts of the kind here in question, the protection afforded must be uniform in all its ramifications, including a uniform rule governing the enforceability of contingent fee contracts between principal and agent."

The conclusion is obvious that the decision of the Majority of the Illinois Appellate Court below is in direct conflict with the federal law, as established by Executive Order 9001, and as particularly announced in the *Flintkote* case.

Executive Order 9001 A Matter of First Impression for This Court

We end this Argument by pointing out the important fact that the construction and interpretation of Executive Order 9001 as raised in the Petition presents a question of first impression for this Court. As we have shown above, this notable Executive Order has been passed upon and construed by the state courts in several cases; and also has been construed by the federal courts in a number of cases. But the language of that Order has never received any construction from this Court.

One of the grounds specified in Rule 38 of this Court concerning certiorari (Par. 5) states that review by certiorari will be considered by this Court in its discretion, particularly:

> "(a) Where a State Court has decided a Federal question of substance not theretofore determined by this Court, or has decided it in a way probably not in accord with applicable decisions of this Court."

The situation mentioned in that language of Rule 38 is, we say, specifically presented by the Petition in this case. Here, then, we have a further ground (in addition to those already mentioned) why it would seem just and appropriate to grant certiorari in this case.

CONCLUSION

For the reasons indicated in this Brief, it is respectfully submitted that this case is one calling for the exercise by this Honorable Court of its supervisory powers over questions of federal law. To that end a writ of certiorari should be granted to review the Majority decision of the Appellate Court of Illinois, and this Court should reverse that decision.

Respectfully submitted,

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Dated at Chicago, Illinois,
December 5, 1951.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1951.

No. 473

COYNE ELECTRICAL SCHOOL, INC.,
Petitioner,

vs.

F. J. BUCKLEY AND E. H. BUCKLEY, Doing Business As F. J. BUCKLEY AND COMPANY,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

STATEMENT OF THE CASE.

Petitioner's statements of facts both in the petition and in the brief contain serious inaccuracies. The facts are fully set forth in the opinion of the Appellate Court (R. 419, 343 Ill. App. 420, 99 N.E. 2d 370). The so-called summary statement in the petition is an argument based on isolated excerpts from the very extensive testimoney heard by the Master. (2144 record pages and 187 exhibits). Further, the judgment of the Appellate Court, to review which this writ is sought, became final on June 22, 1951 when that Court denied petitioner's petition for a certificate of importance as the basis of an appeal to the Illinois Supreme Court (R. 364), and not

on September 21, 1951 as claimed by petitioner (Pet. 1), since the abortive attempt of petitioner to invoke the appellate jurisdiction of the Illinois Supreme Court to review the Appellate Court's decision, which under Illinois practice is made final, cannot serve to extend the 90-day period in which the Judicial Code provides that writs of certiorari must be sought. (28 U.S.C.A. Sec. 2101 (c)). Consequently this petition is not filed in apt time.

Secondly, the deprecating language of the petition as to the work performed by Buckley (Pet. 2) seeks to hide from the Court the fact that petitioner sought out and hired Buckley to act as its agent to secure government war contracts and that Buckley performed extensive services, all to petitioner's complete satisfaction, which netted it contracts in excess of $1,226,722. (R. 26, 27), all of which petitioner retains, seeking to avoid liability on its agreement on the claimed grounds of illegality. Similarly, the statement of the petition (Pet. 4) that Buckley was the only agent in Washington soliciting training contracts on a percentage basis is absolutely contrary to the facts (R. 335, 336). Petitioner's argument that Buckley lacked experience in educational matters and therefore the qualifications to properly represent Coyne (Br. 2) is entirely beside the point since Buckley was hired to act as a salesman to present to the proper officers the merits of petitioner's school in the best possible manner, which was so ably done that petitioner secured contracts totalling over 1¼ million dollars as a result of his efforts (R. 245); and the services in this regard were more than gratefully received by petitioner as complete and sufficient under the terms of their contract, and part payment thereon made (R. 23, 24, 46).

Lastly, but most important, the entire petition is based on the argument that improper influence was either con-

templated by the parties in their contract or used by Buckley in securing the Government contracts. This contention, as are all of the contentions listed above, is absolutely contrary to the record, to the findings of the Master, to the decree of the Chancellor and to the judgment of the Appellate Court, and it should be noted that at no time did petitioner question the correctness of these findings before the Appellate Court by cross appeal, the procedure which Illinois practice requires if review of such findings was desired.

Petitioner has urged, as a grounds of invoking the jurisdiction of this Court, that the Appellate Court has interpreted Executive Order 9001 (50 App. U.S.C.A. § 611.) in accordance with State law and contrary to Federal law, (Pet. 9) and has urged the existence of divergent so-called Federal and State rules in relation thereto. This argument is misleading in that a consideration of the cases, both Federal and State, cited in the Appellate Court's opinion and in Point IV of this brief leads to the conclusion that no such split exists, each case whether Federal or state, having been decided on its own merits. Further, the numerous decisions of both this Court and the lower Federal Courts cited in the Appellate Court's opinion show conclusively that the decision herein was rendered in accordance with pertinent Federal law.

ARGUMENT.

I.

This Petition Was Not Filed in Apt Time.

This petition seeks review of a judgment of the Appellate Court entered June 1, 1951 reversing the Superior Court of Cook County and directing an accounting in accordance with the findings and the conclusions of the Master (R. 363). On June 13, 1951 that Court denied petitioner's petition for a rehearing (R. 363). On June 22, 1951 the Court denied petitioner's so-called *Petition for a Rehearing to Reconsider and Grant said Petition for a Rehearing,* and also denied its petition for a certificate of importance, requested as the basis of an appeal to the Illinois Supreme Court (R. 364). Under Illinois practice the decree of the Appellate Court thereupon became final, since Section 75(2) of the Illinois Practice Act (Ill. Rev. Stat. (1951) Ch. 110 § 199(b)) provides that the Appellate Court's judgment shall be final in all cases, with three exceptions, two of which are here applicable; first, in cases in which the Appellate Court grants a certificate of importance, which was here requested and denied (R. 364); and second, in cases where the Illinois Supreme Court grants leave to appeal, which that Court will grant in *ex contractu* cases in only two instances; (a) *where the judgment appealed from* exclusive of costs shall be $1,500. or more and (b) in cases in which the *judgment is against the plaintiff* and a certificate is issued by the Appellate Court or by a Judge thereof in vacation that there is involved in the claim of plaintiff $1,500. or more.

The Appellate Court's judgment for plaintiff was not a money judgment but merely a judgment directing an accounting to determine the amount due. The certificate by the dissenting Judge, issued in vacation of the Court, (R. 364) that there was involved in plaintiff's claim $1,500. or more could not serve as the basis of the Illinois Supreme Court's jurisdiction since the judgment was not against plaintiff, a requirement for the issuance of the certificate. The Illinois Supreme Court correctly denied the petition for leave to appeal since the certificate was not issued within the purview of the section authorizing it, and was a nullity, the Appellate Court's decision remaining within the large body of decisions of that Court which are by Illinois practice made final, and not within the exception to that rule of finality. The Illinois Supreme Court has said in *Martin* v. *Estate of Ida I. Martin,* 377 Ill. 392, 395 (1941) that:

> "Continuously since the amendment of 1929, to the applicable section of the Practice act of 1907, the jurisdiction of this court to review judgments of the Appellate Courts in cases where the judgment is in favor of the plaintiff, is based upon the amount of the 'judgment' and not upon the 'amount involved,' as, under the prior acts. In view of this material change in the language of the jurisdictional section of the statute, the cases cited have no application to the statute as it is now worded.
>
> "Under the present statute this Court has no jurisdiction to review a judgment of an Appellate Court in an action *ex contractu,* where the judgment is in favor of the plaintiff and is less than $1500, except upon appeal granted by the Appellate Court, in accordance with the provisions of section 75 (2)(1) of the Civil Practice act." (Certificate of Importance).

> "Even before the statute was amended making the amount of the judgment the determining factor as to the jurisdiction of this court, it was held that where there was a trial on the merits, the amount of the judgment controlled as to the appellate jurisdiction of this court. It is only when there was no trial on an issue of fact in the court below that resort can be had to the pleadings to determine the amount involved." (Citations)

The petition for leave to appeal to the Illinois Supreme Court, being improper and contrary to Illinois practice, could not toll the running of the 90-day period provided by the Judicial Code (28 U.S.C.A. Sec. 2101 (c)) until September 12, 1951 when the Illinois Supreme Court denied that petition (R. 453), any more than could petitioner's completely extra-legal and unheard-of *Petition for Re-Consideration of Denial of Petition for Leave to Appeal* further toll the running of that period until September 21, 1951 when that petition, in turn, was denied (R. 453). If petitioner's position were correct any number of similar unauthorized petitions could be filed *ad infinitum* each in turn further extending the period in which this Court's jurisdiction might be invoked.

The decisions of this Court leave no doubt that when once a judgment has become final, the time for making application for certiorari begins to run. In *Dept. of Banking, etc.* v. *Pink,* 317 U.S. 264, (1942) for example, this Court in denying a petition for certiorari for want of jurisdiction because it was filed too late, said (p. 268):

> "For the purpose of the finality which is prerequisite to a review in this Court, the test is not whether under local rules of practice the judgment is denominated final (citing cases), but rather whether the record shows that the order of the Appellate Court has in fact fully adjudicated rights and that that adjudication is not subject to further review by

a state court. See *Gorman* v. *Washington University*, 316 U.S. 98. Where the order or judgment is final in this sense, the time for applying to this Court runs from the date of the Appellate Court's order, since the object of the statute is to limit the applicant's time to three months from the date when the finality of the judgment for purposes of review is established."

In *Morse* v. *U. S.*, 270 U.S. 151 (1926) this Court denied an appeal from the Court of Claims under circumstances analogous to those involved in this case. The Court of Claims decided against Morse in his action to recover salary on January 21, 1924, and denied his motion for a new trial on May 4, 1924. On June 9, 1924, he filed a motion asking that his case be reconsidered and a new trial granted, and on denial thereof, he attempted to appeal on September 5, 1924. This Court held that his motion of June 9 was a mere application for leave to file a motion and did not suspend the running of the 90-day period for appeal. The appeal was denied because not brought within 90 days of May 4, the date when the first motion for a new trial was denied, and therefore the date on which the judgment became final. A similar result was reached in *Gypsy Oil Co.* v. *Escoe*, 275 U.S. 498 (1927) in an application for certiorari to a state court.

For this reason petitioner's application for a writ of certiorari, not having been filed in the time provided by statute, should be denied.

II.

It Is Not the Custom of This Court Upon Certiorari to Question Findings of Fact Made by the Highest State Court.

Aside from the failure of petitioner to seek this Court's writ of certiorari in proper time, petitioner has not given this Court a factual basis to justify its intervention. Petitioner's prayer for certiorari is based on two factual assumptions, (1) that improper influence was contemplated by the parties or used by Buckley in securing for petitioner the numerous Government contracts, or (2) that Buckley did not come within the exception to Executive Order 9001 (50 App. U.S.C.A. § 611) allowing contingent fee contracts for agent securing Government contracts. Both of these factual assumptions are incorrect. As to the former, the Master specifically found that the use of political or personal influence by Buckley in procuring Government contracts for petitioner was not contemplated by the parties in their agreement nor was such influence used (R. 29). This finding was approved by the Chancellor (R. 46) and by the Appellate Court (R. 61) which under Illinois law has the right to make factual findings. *Hadley* v. *Union Trust and Savings Bank,* 308 Ill. 175 (1923); Ill. Rev. Stat. (1951) Ch. 110 § 213. It should be noted that no objection to the Chancellor's affirmance of the Master's finding in this regard was made by petitioner in the Appellate Court by cross-errors, necessary under Illinois practice to preserve such a finding for review, so that petitioner agreed as to the correctness of this finding and cannot now be heard to question it. *O'Brien* v. *First Galesburg National Bank,* 359 Ill. 415, 418 (1935); *Penn Plate Glass Co.* v. *J. H. Rice Co.,* 216 Ill. 567, 574 (1905); *Aachen & Munich*

Ins. Co. v. *Crawford,* 199 Ill. 367, 370 (1902); *Simon* v. *Reilly,* 321 Ill. 431, 433 (1926). This applies to chancery as well as to law actions. *Columbia Theatre Co.* v. *Adsit,* 211 Ill. 122, 124, (1904). See also Rule 35 of the Illinois Supreme Court. (Ill. Rev. Stat. (1951) Ch. 110 § 259.35).

The Master further found from the evidence that at all times involved in this action Buckley had been a *bona fide* and established commercial and selling agency maintained by petitioner for the purpose of securing business within the exception of Executive Order 9001 (R. 30) and the Appellate Court in affirming the findings of the Master also expressly found respondents to be within the exception. It said, "we are convinced by the evidence in this record that plaintiffs come within the exception contained in the regulation". (R. 428).

This Court has frequently held that it would not disturb findings of fact made by the highest state courts under any but the most extraordinary circumstances. In *Milkwagon Drivers Union* v. *Meadowmoor Dairies,* 312 U.S. 287 (1940), for example, it had before it an injunction in a labor dispute originally issued by an Illinois state court. The case had been heard by a Master in Chancery who recommended that the Union's picketing, being accompanied by violence, should be enjoined. The Chancellor overruled the Master and held that peaceful picketing could continue and that only the violence should be enjoined. The Illinois Supreme Court reversed the Chancellor and directed that a permanent injunction against all picketing, as recommended by the Master, be entered. This Court took the case on certiorari and affirmed the decision below, holding that it would not disturb the facts as found by the Master and authenticated by the Illinois Supreme Court. It said (p. 294):

"In this case the Master found 'intimidation of the customers of the plaintiff's vendors by the commission of the acts of violence', and the Supreme Court justified its decision because picketing, 'in connection with or following a series of assaults or destruction of property, could not help but have the effect of intimidating * * *'. *It is not for us to make an independent valuation of the testimony before the Master.* We have not only his findings but his findings authenticated by the State of Illinois speaking through her Supreme Court. We can reject such a determination only if we can say that it is so without warrant as to be a palpable evasion of the constitutional guarantee here invoked. The place to resolve conflicts in the testimony and in its interpretation was in the Illinois courts and not here. *To substitute our judgment for that of the state court is to transcend the limits of our authority.*" (Emphasis supplied.)

Petitioner has given this Court no evidence that would justify a conclusion that these findings are "so without warrant as to be a palpable evasion of the constitutional guarantee" as mentioned in the citation last above quoted, and this Court should not be asked to search this voluminous record and re-evaluate testimony to justify the contentions of petitioner that have already been found to be without merit by the Master, the Chancellor and the Appellate Court.

III.

Executive Order 9001 Does Not Bar This Action.

Aside from the factual findings that respondents come within the exception to the Executive Order, the argument of petitioner completely disregards the purpose and intent of the Executive Order. Executive Order 9001 (50 App. U.S.C.A. § 611) was issued by the President De-

cember 27, 1941 on authority granted by Title II of the First War Powers Act (50 App. U.S.C.A. § 601 *et seq.*) by which the President was empowered to authorize any department or agency of the Government exercising functions in the prosecution of the war effort to enter into contracts *without regard to existing provisions of law* relating to the making of such contracts, their performance, or modification, and to prescribe regulations in reference thereto. The Executive Order here involved authorized the War and other departments to enter into contracts of all types without regard to the provisions of law relating to the making of such contracts and the requirements relative to advertising, competitive bidding, performance, bonds or security. Title II of the Order prescribed regulations for the exercise of the authority conferred on the departments. Paragraph 1 requires the keeping of records of contracts by the various departments. Paragraph 2 prohibits discrimination because of race, color, creed or national origin, and further provides that all contracts would be deemed to incorporate by reference a provision that the contractor and any sub-contractor thereunder should not so discriminate. Paragraph 3 provided for assignment of claims, and paragraph 4 for advance payment. Paragraph 5, the paragraph involved herein, is as follows:

> "Every contract entered into pursuant to this order shall contain a warranty by the contractor in substantially the following terms:
>
> "The contractor warrants that he has not employed any person to solicit or secure this contract upon any agreement for a commission, percentage, brokerage, or contingent fee. Breach of this warranty shall give the Government the right to annul the contract, or, in its discretion, to deduct from the contract price or consideration the amount of such commission, per-

centage, brokerage, or contingent fees. This warranty shall not apply to commissions payable by contractors upon contracts or sales secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business."

Bradley v. *American Radiator and Standard Sanitary Corporation,* 159 F(2d) 39 (C.A. 2d, 1947) is relied on and quoted by petitioner (Br. 20) as holding that the exception of the Executive Order creates a privileged class of persons who may receive contingent fees for securing Government contracts while others may not. Assuming this decision correctly interprets the Executive Order, the finding of the Appellate Court that respondents were within that exception completely answers petitioner's contention. To hold otherwise would be to read the exception completely out of the Order.

It is significant to note among the cases dealing with the Order that where there is a finding that an agent is within the exception of paragraph 5 both the Federal and state courts uniformly allow recovery. *Reynolds* v. *Goodwin Hill Corp.*, 154 F. (2d) 553, (C.A. 2d, 1946); *Beach* v. *Illinois Lumber Co.*, 92 F. Supp. 564 (E.D. Ill. 1950); *Ebeling* v. *Swaine Mfg. Co.*, 892 S.W. (2d) (Mo. 1948).

The decision of *Mitchell* v. *Flintkote Co.*, 185 F. (2d) 1008 (C.A. 2d, 1951), relied on by petitioner and described as "controlling" did *not* involve an agent who came within the exception to the Order. This case is therefore neither controlling nor persuasive, and its loose language has been severely criticized in 64 Harv. Law. Rev. 1200. The same court, upon a finding that the agent came within the exception, allowed recovery. *Reynolds* v. *Goodwin Hill Corp., supra.* In *Bradley* v. *American Radiator & Standard Sanitary Corp.*, 159 F. (2d) 39 (C.A. 2d, 1947), it was also found that the agent was not within the exception.

Since respondents were bona fide agents within the exception to the Order, there can be no question of the validity of their contract on the grounds of public policy, because the enabling statute under which the Order was issued authorized the President to make regulations permitting Governmental departments to enter into contracts without regard to the provisions of existing law relating to the making, performance, amendment or modification of contracts. (50 App. U.S.C.A. § 601 *et seq.*).

Petitioner's contention that respondents could not come within the exception because their agency was limited to procuring Government contracts is contrary to the express purpose of the Order (See Exhibit 601, Report of the Hearings of the House Naval Affairs Committee on the Progress of the War Effort, Vol. 1, 78th Congress, first session, setting forth the full history of the enactment of the Order). In 1918, Attorney General Palmer proposed a warranty against contingent commissions of all kinds. President Wilson, in 1919, modified this to permit "contracts obtained through bona fide commercial representatives or agencies by an established business process everywhere recognized". The Attorney General thereupon modified the exception so that in 1923 it excepted contracts "secured or made through bona fide established commercial or selling agencies maintained by the contractor for the purpose of securing business *with others than the United States*". But since so many agents represented contractors only before Government departments, the War Department in 1924 recommended modification of the exception by dropping the phrase, "with others than the United States". This change was approved by the Attorney General who, in commenting on this modification in a letter to the Interdepartmental Board of Contracts and Adjustments, said that the modi-

fication was within the purview of President Wilson's change. The warranty has remained the same to date.

This Court in *Muschany* v. *U.S.*, 324 U.S. 49 (1944) in approving the use of a commission system for Government purchases cited the Executive Order here in question, among others, as an expression of Congressional approval for this type of contract and said (p. 68) "We do not see that these statutes manifest a public policy against the use of a commission system for public purchases."

Various administrative branches of the Government have similarly approved this view. In *North American Iron and Steel Co.* v. *Navy Department*, 4 C.C.F., Par. 60,238 (1947) and *Alloy Products Corp.*, 4 C.C.F., Par. 60,389 (1947) the Office of Contract Settlement Appeal Board and the Army Board of Contract Appeals, respectively, approved agencies dealing solely with the Government. Comptroller General's decision No. B-26993, 22 Comp. Gen. 124 (1942) stated that it was not the purpose of the Executive Order to interfere with ordinary trade practices of persons desiring to contract with the Government.

A further argument against petitioner's contention is that it reads into the Executive Order sanctions not there contained by declaring the contract illegal and denying recovery. The sanctions provided by paragraph 5 of the Order are a right of the Government to annul the contract, and a right of the Government to deduct the amount of commissions paid. There is nothing in the Order even suggesting that a failure of compliance would invalidate a contract with a third person. It is axiomatic that where an act contains its own sanctions a court will not read into it other sanctions. This Court so held in the recent

case of *Bruce's Juices* v. *American Can Co.*, 330 U.S. 743 (1947), where in a suit on notes for the purchase price of cans, defendant contended the notes were uncollectible because given in a transaction involving a price discrimination condemned by the Robinson-Patman Act. This Court observed that this Act prescribed several specific sanctions, and that denial of the right to collect the purchase price was not one of them. The Court refused to add such an additional sanction by judicial legislation and allowed plaintiff to recover. It said, (p. 755):

> "But when the contract sued upon is not intrinsically illegal, the Court has refused to allow property to be obtained under a contract of sale without enforcing the duty to pay for it because of violations of the Sherman Act not inhering in the particular contract in suit and has reaffirmed the 'doctrine that "where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, *the punishment or the remedy can be only that which the statute prescribes.*" ' *D. R. Wilder Mfg. Co.* v. *Corn Products Refining Co.*, 236 U.S. 165, 174, 175; *Connolly* v. *Union Sewer Pipe Co.*, 184 U.S. 540." (Emphasis supplied.)

A similar result has been reached by the Illinois Supreme Court in *Grody* v. *Scalone*, 408 Ill. 61 (1950); and *Cohen* v. *Lerman*, 408 Ill. 155 (1951).

Wherefore petitioner's argument that the contract is illegal under Executive Order 9001 is without merit. The Order, if anything, specifically approves the contract.

IV.

Contingent Fee Contracts for the Procurement of Government Business Are Valid Under the General Law, Both Federal and State, Where No Improper Means Are Used or Contemplated.

In establishing the contract as valid under Order 9001 regardless of any existing general law to the contrary, we do not concede that petitioner's argument that there is a federal public policy against all contingent fee contracts for the procurement of government business is well founded. Indeed, the decisions of this Court, the lower federal courts, and the state courts involving contracts of this type indicate very clearly that under the general law such contracts are valid where legitimate business methods are contemplated and used by the parties. It is only where the courts find that improper political or personal influence is contemplated or used that such contracts are held invalid and against policy. A few of the significant cases holding such contracts valid where legitimate business methods are involved are; in this Court *Wylie* v. *Cox*, 56 U.S. 415 (1853); *Valdes* v. *Larrinaga*, 233 U.S. 705 (1914); *Steele* v. *Drummond*, 275 U.S. 199 (1927); in the lower federal courts—*J. E. Hanger, Inc.* v. *Fitzsimmons*, 273 F. 348 (C.A.D.C. 1921); *Allison* v. *Dodge*, 287 F. 621 (C.A. 3d 1923), second opinion 13 F. (2d) 588 (C.A. 3d 1926); *Coyne* v. *Superior Incinerator Co.*, 80 F. (2d) 844 (C.A. 2d 1936); *Aetna Standard Engineering* v. *Comm.*, 15 T.C. 284 (1950); and in the Illinois courts—*Leuy* v. *Standard Plunger Elevator Co.*, 296 Ill. 295 (1921); *Groome* v. *Freyn Engineering Co.*, 374 Ill. 113 (1940).

Decisions holding that such contracts are invalid because of improper, personal or political influence are *Providence Tool Co.* v. *Norris*, 69 U.S. 45 (1864); *Jamieson* v. *Iles*, 219 Ill. App. 432 (1920).

Professor Williston in his *Treatise on Contracts* has recognized this distinction among the cases, and in section 1729A he quotes with approval the following language of a New York Court:

> "To declare that he may not employ an agent, upon commission, where the Government is the prospective buyer, is to take away what is one of the elements of the enjoyment of ownership—the unrestricted right to sell. * * * Treated as a matter distinct in its nature from agreements to procure legislation, *an agreement to compensate an agent for his successful efforts in traffic with the government has been held binding where unfairness in the dealings or an intention to resort to corruption did not actually appear from the facts.*" (Emphasis supplied.)

Clearly the great group of contingent fee contracts in which legitimate business methods are contemplated and used are held by the courts, both Federal and state, to be valid obligations. In view of the Master's finding approved by the Chancellor, and affirmed by the Appellate Court in this case that no improper influence was contemplated by the parties or used by the respondents, there can be no doubt that under the general Federal law the contract of respondents and petitioner is binding and enforceable.

CONCLUSION.

Respondents respectfully urge that the petition for a Writ of Certiorari be denied.

Respectfully submitted,

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JAN 18 1952
CHARLES ELMORE CROPLEY

IN THE

Supreme Court of the United States

OCTOBER TERM, 1951

No. 473

COYNE ELECTRICAL SCHOOL, INC.,
Petitioner,

vs.

F. J. BUCKLEY AND E. H. BUCKLEY, DOING BUSINESS AS F. J. BUCKLEY AND COMPANY,
Respondents.

PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PETITIONER'S REPLY TO RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:

BRIEF COMMENT CONCERNING RESPONDENTS' STATEMENT OF THE CASE

In respondents' "STATEMENT OF THE CASE" there appears an extraordinary statement suggesting and implying to this Court that testimony was taken showing a very large

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[1]Following the practice used in the Petition, the petitioner is herein referred to as *Coyne* or *the Coyne School,* and respondents are herein referred to as *Buckley.*

total amount of petitioner's Government contracts which Buckley claimed to have procured. That suggestion in Buckley's Brief (see Note 2) is entirely erroneous and can hardly fail to mislead this Court about the whole case. No evidence whatever appears in the Record on the point. On the contrary, the figures set out by Buckley are mere calculations by his Counsel. Moreover, the Record shows that the Counsel made such calculations from Finding No. 28 of the Master (R. 26, 27), which particular Finding was squarely overruled by the trial court's Decree (R. 47), and the trial court's Decree in this respect was never disturbed by the Illinois Appellate Court.

The only issues before the Master and before the Chancellor, and the only issues passed upon by the Appellate Court, are two:

(a) Whether or not there existed a contingent fee agreement between Coyne and Buckley; and

(b) If such an agreement existed, whether or not it was valid under federal public law and particularly under Executive Order 9001.

No testimony whatever was taken as to the total amount of petitioner's school contracts with the Government. Accordingly, this statement in respondents' Brief to which we have referred is highly improper.

Another grave misstatement in Buckley's Brief (page 2) recites:

"... petitioner secured contracts totalling over 1¼ million dollars as a result of his efforts (R. 245); ..."

---

[2]Buckley's Brief in Opposition (page 2) says on this point:

"... Buckley performed extensive services, all to petitioner's complete satisfaction, which netted it contracts in excess of $1,226,722. (R. 26, 27), all of which petitioner retains," etc.

If the Court will turn to the cited pages of the Record, it will find no justification whatever for that statement.

Here, again, if the Court will turn to the Record it will be found there is no evidence whatever justifying that statement. The truth is, as Colonel Rooks testified (R. 326 and 339), that Buckley had nothing to do with securing any of the contracts which Coyne got (under Colonel Rooks' supervision) from the United States Government.

Finally, Buckley's Brief makes a totally erroneous statement in attempting to deny that Buckley was "the only agent" in Washington attempting to solicit school contracts on a percentage basis.[3] Here, again, if the court examines the Record it will see that the evidence completely disputes Buckley's contention on this point. Thus it particularly appears in the Record (R. 337) that Colonel Rooks positively stated:

> "He (Buckley) is the only one I had any knowledge of acting on a commission basis."

We call particular attention to these erroneous statements, but will not comment further on such methods of advocacy.

I.

THE PETITION WAS TIMELY FILED.

Under Point I of respondents' *"Argument"* much emphasis is placed upon a belabored contention that

"This Petition Was Not Filed in Apt Time."

This entire Point is based upon the theoretical argument that the Supreme Court of Illinois did not have "jurisdiction" to hear and consider Coyne's Petition for Leave to

---

[3]The language of Buckley's Brief on this point is (page 2):

> "Similarly the statement of the petition (Pet. 4) that Buckley was the only agent in Washington soliciting training contracts on a percentage basis is absolutely contrary to the facts (R. 335, 336)."

Appeal, from the Appellate Court; and that therefore petitioner's 90 day period of time for filing should be counted from June 22, 1951, when the Appellate Court finally disposed of the case (R. 364). The argument about the Supreme Court's alleged lack of "jurisdiction" is based upon Buckley's interpretation of a provision in the Illinois Civil Practice Act (Smith-Hurd Ill. Ann. Stat. Ch. 110, Sec. 199) which in effect makes Appellate Court decisions final where the judgment involved is less than $1500.

Coyne's Petition (page 8, footnote 6) gives the substance of the Record as to the matter of *time*—being the dates upon which the various rulings and orders of the Appellate Court and of the Supreme Court, respectively, were made and entered. In substance it appears that the Appellate Court ended its consideration of the case June 22, 1951, and that within the time permitted under the Illinois statutes Coyne filed in the Supreme Court of Illinois, its "Petition for Leave to Appeal" from the Appellate Court. Regardless of what Buckley may argue about the "jurisdiction" of the Supreme Court, the Record shows (R. 444) that the Supreme Court *took jurisdiction* of Coyne's Petition for Leave to Appeal, and considered it and denied that Petition September 12, 1951. The Record further shows that Coyne promptly filed in the Supreme Court a printed "Motion for Reconsideration," and the Supreme Court took jurisdiction of that Motion and considered it and denied it September 21, 1951 (R. 453).

Therefore, since the Record in this Court shows in convincing fashion that the Supreme Court of Illinois *took jurisdiction* of the case, we say that Buckley's agrument that the Illinois Supreme Court did not have "jurisdiction" is foreclosed and decided.

The Record further shows that on July 18, 1951 the Appellate Court, in vacation, entered an Order finding and

certifying that with respect to Buckley's claim "there is fairly involved in Appellants' claim the sum of $1500 or more." This Order of the Appellate Court (R. 364) was secured by Coyne in accordance with the settled practice in Illinois, and for the particular purpose of preventing the raising of any such question as that here raised by Buckley. It was this Certificate of the Appellate Court that obviously satisfied the Supreme Court on the point of its own jurisdiction under the Illinois Civil Practice Act.

The only Illinois case which Buckley's Brief cites in support of its argument as to the lack of jurisdiction in the Supreme Court is *Martin* v. *Estate of Martin,* (1941) 337 Ill. 392. The precise question raised in Buckley's Point I was not definitely considered by the Supreme Court of Illinois in the *Martin* case; and it is only by using that case arguendo that Buckley's Brief is able to cite it. The *Martin* case shows that the plaintiff's pleading claimed an amount in excess of $1500 but that the judgment appealed from was less than $1500. Under that situation it was apparent on the record before the Supreme Court in the *Martin* case that the minimum requirement of the Illinois Practice Act that the appellant's claim must be for $1500 or more, was not met. Obviously, the Illinois Supreme Court in the *Martin* case was correct in holding that it did not have jurisdiction. It is obvious also that the extended quotation from the *Martin* case in Buckley's Brief (pages 5 and 6) has little application to the case at bar.

A Controlling Case

Buckley's Brief on this Point I has failed to cite what we consider a controlling case on this "Point I", *Matthews* v. *Trinity Universal Insurance Co.,* (1947), 397 Ill. 174, 74 N.E. 2d 787. In that case the defendant had been successful in the trial court, but the Appellate Court of Illi-

nois had reversed the judgment and sent the case back "with directions to enter judgment for the plaintiff" under certain conditions. The defendant in the *Matthews* case took an appeal to the Supreme Court of Illinois. However, the defendant failed to secure from the Illinois Appellate Court the necessary Certificate under the Illinois Practice Act (as was done by the petitioner in this *Buckley* v. *Coyne* case), to the effect that "$1500 or more" was involved in the claim of the plaintiff. After the Petition for Leave to Appeal was granted, plaintiff filed a motion to dismiss the appeal for lack of jurisdiction because of the absence of the Certificate of the Appellate Court.

The Supreme Court in the Matthews case sustained the motion to dismiss for lack of jurisdiction because no such Certificate of the Appellate Court appeared in the record. The Court laid down the applicable rule of law in such cases in clear language, as follows:

> "In the present case, the Appellate Court did not direct that judgment be entered in favor of plaintiff for any specified sum. Judgment was directed contingent upon there being no other defense interposed to his action. Judgment in the trial court was against the plaintiff. There is no judgment in existence from which the jurisdictional amount can be determined. Under former statutes it would have been possible, where there was no trial on an issue of fact, to resort to the pleadings to determine the jurisdictional amount involved. The present statute contains no such provision. In this class of cases jurisdiction is now based on the amount of the judgment. (*Martin* v. *Estate of Martin,* 377 Ill. 392). There being no judgment from which the amount involved can be determined, it follows that no jurisdiction is conferred on this court to review the judgment of the Appellate Court in the absence of a certificate issued by that court, or by one

> of the judges thereof in vacation, to the effect that there is fairly involved in the claim of the plaintiff the sum of $1500 or more."

The rule thus stated by the Supreme Court of Illinois is in accord with common sense. It was certainly not the intention of the Illinois Legislature, in the Practice Act, to say that the Supreme Court is utterly without appellate jurisdiction in this *Buckley* case, even though the Appellate Court has made the statutory Certificate as to the amount of the claim involved. The issuance of that Certificate by the Appellate Court of Illinois should be construed in this Court as a binding interpretation of the meaning of the Illinois Practice Act for the purposes of this *Buckley* case.

Furthermore, the Supreme Court of Illinois did not deny Coyne's Petition for Leave to Appeal on jurisdictional grounds. On the contrary, the Record shows the Supreme Court of Illinois took jurisdiction of Coyne's Petition for Leave to Appeal, but denied it. Therefore we have the clearly implied holding of the Supreme Court of Illinois that it had jurisdiction in this *Buckley* v. *Coyne* case.

This Court has held in *Gregory* v. *McVeigh,* (1875) 23 Wall. 294, 23 L.Ed. 156, that the denial by the highest court of a state of a petition to appeal "is equivalent to a judgment of affirmance, and is such a final judgment as may be made the basis of proceedings under the appellate jurisdiction of this court." Therefore, under the ruling of this Court the denial by the Supreme Court of Illinois of Coyne's Petition for Leave to Appeal constitutes "a judgment of affirmance" of the Appellate Court's holding in the case at bar. This is particularly true since Buckley never properly raised the point in the Supreme Court of Illinois that the Court had no jurisdiction of Coyne's Petition for Leave to Appeal by motion to dismiss.

We respectfully say that the decision of this Court in the *Gregory* v. *McVeigh* case, taken in connection with the holding of the Supreme Court of Illinois in *Matthews* v. *Trinity Universal Insurance Co.*, case, *supra,* completely disposes of Buckley's argument on this "Point I."

II.

WHETHER BUCKLEY'S ACTIVITIES COME WITHIN THE EXCEPTION OF EXECUTIVE ORDER 9001 IS A MIXED QUESTION OF FACT AND LAW.

Petitioner recognizes that this Court will not disturb findings of fact made by the highest state court except under extraordinary circumstances. Among the extraordinary facts found in the Appellate Court's Opinion is the utterly amazing finding appearing in the Majority Opinion (R. 423), when the Court speaks of a modification of Buckley's compensation, stating, ". . . the rate of pay to Buckley was modified about March 21, 1942; . . . this modification was evidenced in writing by a letter from Lewis". No such writing is relied upon by respondents, and indeed, there is no writing or memorandum which supports a modification of the over-all contingent fee agreement of March 12, 1942. The respondents themselves do not rely upon a written agreement; their action is based upon an asserted oral agreement. Yet the Appellate Court gratuitously finds the existence of a written agreement. *It is impossible to find this written agreement among the exhibits introduced in this case.*

The Master in this case found (R. 30) that Buckley (individually, and not the partnership, and not including his wife) was a bona fide and established commercial and selling agency maintained by defendant within the exception of Executive Order 9001. This finding was expressly overruled by the Chancellor after extensive review of the facts

and argument (R. 47, paragraph G). The facts as to what Buckley did are clear from the testimony. The Chancellor below held that Buckley's activities did not come within the exception of Executive Order 9001, whereas the Appellate Court held they did. We respectfully submit that the controlling decisions in the federal courts are directly opposed to the decision on this issue by the Appellate Court. The Appellate Court Opinion makes no determination of fact as such with respect to Buckley's activities as coming within the exception provided in Executive Order 9001. It is simply the opinion of the Appellate Court that these activities come within the exception, and it is this opinion which the petitioner urges is not supported by the controlling federal decisions. For example, the Majority Opinion of the Appellate Court suggests (R. 428) that Buckley's activities come within the exception because they were "not limited to one contract alone." *Not a single federal case can be cited in which a person was employed solely to procure federal contracts where this qualification of the rule is approved.*

Much emphasis is also placed under this Point II of Buckley's Reply Brief on the question of the effect to be given the absence of any direct evidence of the use of political or personal influence by Buckley in procuring government contracts for Coyne. This argument has never impressed this Court in the several instances in which the question has arisen. As stated by Mr. Justice Holmes in *Hazelton* v. *Sheckells,* (1906) 202 U.S. 71,

> "The court will not inquire what was done. If that should be improper, it probably would be hidden, and would not appear. In its inception, the offer, however intended, necessarily invited and tended to induce improper solicitations, and it intensified the inducement by the contingency of the reward. *Marshall* v. *B. & O. R.R.,* 16 How. 314, 335, 336."

CONCLUSION

For the reasons which petitioner has set forth in the Petition and accompanying Brief, and in this Reply to Respondents' Brief, it is respectfully submitted that this case presents an important question of public policy calling for the exercise by this Honorable Court of its supervisory powers over questions of federal law. We respectfully urge this Honorable Court to grant a writ of certiorari to review the Majority Opinion of the Appellate Court of Illinois.

Respectfully submitted,

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Dated at Chicago, Illinois,
January 15, 1952.